Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 75-1284

SPECTOR FREIGHT SYSTEM, INC. OF ILLINOIS,
Petitioner,

vs.

ROY SCHWARTZ,
Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

Petitioner submits this reply brief to specifically contradict significant portions of Respondent's Brief in Opposition submitted to the Court subsequent to the filing of our Petition for Writ of Certiorari. In Respondent's brief challenge is made to the jurisdiction of this Court to consider our Petition. This objection is without merit.

In substance, Respondent alleges that the Federal questions presented to this Court were not timely raised in the lower court. Even assuming, *arguendo,* that the Federal questions were not timely raised, that objection is moot and irrelevant in view of the fact that the Minnesota Supreme

Court considered and expressly decided the Federal questions in their opinion.

The U. S. Supreme Court has held that it is irrelevant whether Federal questions were raised at any time by the Petitioner if the lower court actually decided the matter in its opinion. In *Chambers v. Baltimore and O. R. Company,* 28 S. Ct. 34, 207 U.S. 142, 52 L. Ed. 143, this Court held that the objection that the Federal question is not properly and seasonably raised in the state court is not available to defeat the jurisdiction of the Supreme Court of the United States where it clearly appears from the opinion of that court that the Federal question was assumed to be an issue, was decided against the claim of Federal right, and that the decision of the question was essential to the judgment rendered. In *Chambers,* the Court stated at Page 35 S. Ct., "The defendant objects to our jurisdiction to re-examine the judgment because the Federal question was not properly and seasonably raised in the courts of the state. But clearly, it unmistakably appears from the opinion of the Supreme Court that the Federal question was assumed to be an issue, was decided against the claim of Federal right, and that the decision of the question was essential to the judgment rendered. This is enough to give this Court the authority to re-examine that question on writ of error."

To further support this position, in *People of State of Illinois v. Board of Education,* 68 S. Ct. 461, 333 U.S. 203, 92 L. Ed. 648, 2 A.L.R. 2d 1338, the court stated at Page 463 S. Ct. and Page 207 U.S., "A third ground for the motion is that the appellant failed to properly present in the state supreme court her challenge that the state program violated the Federal Constitution. But in view of the express rulings of both state courts in this question, the argu-

ment cannot be successfully maintained. The motion to dismiss the appeal is denied."

In *Raley v. State of Ohio,* 79 S. Ct. 1257, 360 U.S. 423, 3 L. Ed. 2d 1344, the Court stated at Page 1265 S. Ct., and 436 U.S., "There can be no question as to the proper presentation of a Federal claim when the highest state court passes on it. See *Manhatten Life Insurance Company of New York v. Cohen,* 234 U.S. 123, 134, 34 S. Ct 874, 877, 58 L. Ed. 1245."

In *Cohen,* the Court stated at Page 877, "Let it be conceded, as we think it must be, where the record leaves no doubt that rights under the Full Faith and Credit clause were essentially involved and were necessarily passed upon, there would be jurisdiction to review even though such rights had not been expressly asserted below. . . . The right to review under such condition being in effect for the result of the elemetnary rule that *it is irrelevant to inquire how and when a Federal question was raised in a court below when it appears that such question was actually considered and decided.*" (Emphasis added)

The above holdings are strengthened by the fact that this issue was considered very recently in *Jenkins v. Georgia,* 94 S. Ct. 2750, 418 U.S. 153, 41 L. Ed. 2d 642 (1974). In *Jenkins,* the Court found that where a state supreme court reached and decided a Constitutional issue, the issue could be considered by the United States Supreme Court whether or not the issue was raised by the appellant on state appeal. In that case, Justice Rehnquist stated at Page 2753 S. Ct., 157 U.S., "We now turn to the question of whether appellant's exhibition of the film was protected by the 1st and 14th Amendments, the question which appellee asserts is not properly before us because appellant

did not raise it on his state appeal. But whether or not appellant argued this Constitutional issue below, it is clear that the Supreme Court of Georgia reached it and decided it. That is sufficient under our practice. *Raley v. Ohio,* supra."

Clearly, the above holdings present conclusive authority for the proposition that there is no merit to the contention of the Respondent that the Petitioner did not seasonably raise the Federal questions, since it is deemed to be irrelevant in view of the fact that the Minnesota Supreme Court considered and decided the Federal questions involved.

The above holdings also have substantial foundation in the history of this Court. As early as 1836 *Crowell v. Randell,* 35 U.S. 368, the Court held that in determining whether the record in a case from the state court shows that the point giving jurisdiction to the Supreme Court was raised and decided in the state court, it is not indispensable that it should appear in the record in totidem verbis or by direct and positive treatment. The Court held in that case that it is sufficient that if it is clear from the facts stated, by just and necessary inference, that the question was made and that the state court must, in arriving at its judgment, have decided that question, then jurisdiction is proper. There is no question that the Minnesota Court intended to consider the Federal questions when they specifically referred to them in their opinion. Clearly, the Minnesota Court took the position that there were no Constitutional barriers to the conflicts rule that they used in this case. Consequently, a determination of the Constitutional questions was made by the lower court and this Court has jurisdiction.

This Court held in *Dewey v. City of Des Moines,* 19 S.

Ct. 379, 173 U.S. 193, 43 L. Ed. 655, that if the decision of the state court was such that the judgment and its necessary effect was a denial of the right claimed or referred to, this is sufficient to grant Federal jurisdiction, even though the state did not notice the question. In our case, the record is much stronger than *Dewey* since the state supreme court actually decided the Federal problems in their decision.

Clearly, the Minnesota Supreme Court, deciding the most liberal holding ever before rendered by any state in the Union, specifically considered the Federal implications of what they were doing. For this reason, they specifically stated in their opinion that their holding was not limited by Federal Constitutional standards. The *Crider* case cited by the Minnesota Court specifically considered the question of full faith and credit. By citing and considering the case of *Home Insurance Co. v. Dick,* the Minnesota Court specifically considered the question of due process.

In *American Fire Insurance Co. v. King Lumber,* 39 S. Ct. 431, 24 U.S. 2, 63 L. Ed. 810 (1919), this Court, considering a motion to dismiss on the grounds that the Federal questions were not passed on by the courts of the state, was denied because that proposition was disputed, and the Court stated that justice would be better served by considering the question since it was in dispute. Here there can be no dispute that the Federal questions were considered by the lower court and passed on them in their opinion. But even if there were, the matter that is raised is of such far-reaching and important consequence that this Court should consider the merits of it in order to better serve justice and add stability to the conflict of laws rules. If Respondent persists in his contention that this Court does not have jur-

isdiction, he is free at a later date to make a motion under Rule 35 of the Supreme Court Rules.

Notwithstanding the above holdings that support the proposition that timeliness of presenting the Federal questions is irrelevant where the state court considered and decided the Federal questions, the record will show that Petitioner did in fact timely raise all Federal objections. Petitioner prevailed in the trial court level when the Minnesota District Court held that Indiana law applied to the case. When the Minnesota Supreme Court reversed that decision, applying the law that Petitioner contends was unconstitutional, Petitioner filed a Petition for rehearing with the Minnesota Supreme Court stating its Federal objections. Obviously, Petitioner would not object or raise any Federal questions at the trial court level when it prevailed on that issue. As soon as the Minnesota Court abridged the Federal rights of the Petitioner, the Federal questions were properly raised. It was at that time when the Petitioner first became the initiating party and was capable of presenting the Federal objections. Petitioner could not reasonably anticipate that the decision of the lower court would be reversed by the Minnesota Court extending its conflicts rules further than any other state in the Union. In Minnesota, a respondent in an appeal from a trial court is not required to anticipate that he will be reversed on appeal. This was the position of the Minnesota Court most recently stated in *Kirckof Plumbing and Heating Co. v. State of Minnesota,* — Minn. —, — N.W. 2d —, filed April 2, 1976.

The allegations in Respondent's brief that our Petition for rehearing was not timely filed and that the Petition for Rehearing was denied for lack of jurisdiction are simply not true and unsupported by the record. An Order of Justice James C. Otis of the Minnesota Court dated September 3, 1974, included in the Appendix, demonstrates the time for filing our Petition for re-argument was specifically extended. In the Order, Justice Otis stated, "IT IS ORDERED that the time within which the Respondent's Petition for Rehearing may be served and filed be and hereby is extended to include September 30, 1974." Clearly, since Justice Otis of the Minnesota Court ordered the extension of time to file our Petition for Rehearing, it cannot be reasonably argued that the Petition was not timely filed in the Minnesota Court. Rule 102 of the Rules of Civil Appellate Procedure for Minnesota, which is the same as Federal Appellate Rule 2, provides that the Supreme Court may suspend the requirement or provisions of these rules on application of a party or on its own motion and may order proceedings in accordance with its direction. Consequently, there can be no doubt that Justice Otis had the power to extend the time for filing our Petition for Rehearing to September 30, 1974. Rule 102 is specifically set out in the Appendix.

The record included in this Appendix also demonstrates that the Petition was filed within the time limits set by Justice Otis, by a Notice of Filing dated September 27, 1974. The documents included in the Appendix also show that the Petition for re-argument of Petitioner was denied by the Minnesota Court on October 2, 1974. The October 2, 1974 Order of the Court states only that the Petitions are denied; there is no statement that the Petition was dismissed for lack of jurisdiction as stated on Page 6 of Respondent's brief.

The allegation in Respondent's brief that Petitioner is

lacking jurisdiction in the U. S. Supreme Court because of a failure to give notice to the state Attorney General is patently unmeritorious. The Rules of Court cited on Page 5 of Respondent's brief specifically state that the notice requirement only applies when an *act of the legislature* is drawn in question. The question involved in this lawsuit is an *act of the court* and the Rule of Notice is clearly not applicable to the Minnesota Court. Notwithstanding that important distinction, there is no merit to the contention that the failure to give notice to the Attorney General is jurisdictional as stated on Page 5 of Respondent's brief. The Minnesota decisions cited by Respondent for that position have been specifically overruled by the Minnesota Court in *Elwell v. County of Hennepin,* 221 N.W. 2d 538, — Minn. — (1974), wherein the Court stated at Page 545 N.W. 2d, "We expressly overrule the *Oak Center* case and hold that the failure to serve notice upon the Attorney General under the rules does not deprive this Court of jurisdiction on appeal."

Respondent attaches weight to the fact that two Petitions for Rehearing were decided in the case. However, there were two Defendants in the case at the time the Supreme Court rendered its decision of August 2, 1974, and each Defendant filed a Petition for Rehearing. As shown by the letter of Petitioner's counsel that Respondent included in his brief, it was contemplated that SPECTOR FREIGHT SYSTEM, INC. of Illinois would raise the Federal questions in its Petition for Rehearing. This is further supportwhere he stated that "Respondent's" Petition for Reheared by the Order of Justice Otis, dated September 3, 1974, ing may be served and filed. In that Order, Justice Otis is obviously referring to a single Respondent, as the notation at the top of the Order refers to SPECTOR FREIGHT SYSTEM as "Respondent", and it refers to CONSOLIDATED FREIGHTWAYS as "Respondent-Appellant". The letter of Petitioner's counsel dated August 29, 1974, and the Order of Justice Otis dated September 3, 1974, clearly show that only one Petition for rehearing was filed by Petitioner, even though each Petition for Re-argument naturally contained the names of both the Defendants since their positions were identical.

Respondent also attaches significance to the fact that no Federal questions were raised in a cross-appeal by Petitioner. The record shows that no such cross-appeal by Petitioner was ever made. The record shows that only co-Defendant CONSOLIDATED FREIGHTWAYS cross-appealed and there was no appeal taken by SPECTOR FREIGHT. This is demonstrated by the notation in the Order of Justice Otis dated September 3, 1974, included in this Appendix, which shows that only CONSOLIDATED FREIGHTWAYS was a cross-appellant.

Nor is there any merit to the suggestion that Petitioner somehow waived its Federal objections by not raising any Federal questions in its second appeal. Clearly, Petitioner was without power to do so in view of the last part of the August, 1974 opinion where the Minnesota Court limited the questions on remand to misconduct of Plaintiff's counsel and excessiveness of the verdict.

CONCLUSION

This Court has held in *Jenkins* and *Raley* that if the Federal questions are actually considered by the lower court, the timing and the manner that they were raised is irrelevant. Because the Minnesota Court expressly decided

the Federal questions in their opinion, objections on the basis of timeliness and manner are irrelevant.

Moreover, the Federal questions were raised at the first opportune time by the Petitioner.

In addition, the reliance of Respondent on overruled Minnesota cases to defeat jurisdiction is clearly misplaced. The challenge by Petitioner is of the ruling of the state supreme court.

At this stage in the proceedings, all questions of state law have been decided and the only remaining question to be decided is the constitutionality of the choice of laws rules liberally applied by the Minnesota Supreme Court. This question is of significant Federal importance and completely determines the outcome of this case. These complicated Federal questions should be decided by this Court. If this Court decides that Minnesota abridged the constitutional rights of Petitioner, the result of the case would be exactly opposite. Consequently, there is absolutely no merit to the contention that the decision rests on state grounds since the matter is completely controlled by Federal law at this point.

Respectfully submitted,

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APPENDIX

STATE OF MINNESOTA
IN SUPREME COURT

August 12, 1974

ROY SCHWARTZ,
Appellant-Respondent,

vs. 44158, 44281, 44509, 44525

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE,
Respondent-Appellant,

SPECTOR FREIGHT SYSTEM, INC., OF ILLINOIS,
Respondent.

ORDERED that the time within which the petition for rehearing of respondent Spector Freight System, Inc. must be served and filed herein be and it is hereby extended to include August 22, 1974.

Dated Aug. 13, 1974.

/s/ JAMES C. OTIS
Associate Justice

(Title of Cause—In Supreme Court.)

ORDER

Upon the application of counsel for respondent Spector Freight System, Inc.,

IT IS ORDERED that the time within which the respondent's petition for rehearing may be served and filed be and hereby is extended to include September 30, 1974.

NO FURTHER EXTENSIONS WILL BE GRANTED.

Dated: September 3, 1974.

BY THE COURT

/s/ JAMES C. OTIS
Associate Justice

(Title of Cause—Office of Clerk of Supreme Court.)

(Petition for Reargument Filed)

September 27, 1974

SIR:

You will please take notice that on this date the following order was entered in the above entitled cause:

Application for reargument having been filed herein all further proceedings, except taxation of costs are stayed pending its determination.

Yours respectfully,

JOHN McCARTHY
Clerk Supreme Court

A petition for reargument does not stay taxation of costs and disbursements.

(Title of Cause—Office of Clerk of Supreme Court.)

(Petition Denied)

October 2, 1974

SIR:

You will please take notice that on this date the following order was entered in the above entitled cause:

ORDERED, that the petitions for reargument herein be and the same hereby is denied and stay vacated.

Yours respectfully,

JOHN McCARTHY
Clerk Supreme Court

RULE 102. SUSPENSION OF RULES

In the interest of expediting decision upon any matter before it, or for other good cause shown, the Supreme Court, except as otherwise provided in Rule 126.02, may suspend the requirement or provisions of these rules on application of a party or on its own motion and may order proceedings in accordance with its direction.